



CRIMINALIZATION OF MARITAL RAPE: WHETHER A STEP TOWARDS PROMOTION OR PROHIBITION OF CHILD MARRIAGE?

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I. INTRODUCTION

Indian society believes in morals, values, beliefs, rituals and considers the institution of marriage as a sacrament. Marriage is a union of two hearts. Success of married life depends on the edifice built with the mutual trust, understanding, love, affection, service and self-sacrifice. Once this edifice is shaken, happy married life will be shattered into pieces. This result is one of misery and emotion. When it is impossible to live like husband and wife, any compulsion to unite them will lead to social evil and disturbance of mental peace and disorder in the family life. However rigid the social fabric, it is not the social system but the personal safety of the parties to the wedlock shall prevail.¹ Child marriage in India has been practiced for centuries, with the fact that children were forced to get married before they attain physical and mental maturity. Children at this tender age were not in a position to discern what is wrong and what is right for them. The problem of child marriage in India has innumerable reasons be it taboos in the society, prejudices, socio-economic factors or protection from invaders. Various social movements which sprung up during the time of British rule in India tried to eradicate various social practices e.g., dowry, sati including child marriage. The British enacted laws to prohibit such social practices and hence enacted various social welfare legislations

II. LAWS PERTAINING TO THE STATUS OF CHILD MARRIAGE IN INDIA

The Child Marriage Restraint Act, 1929 was enacted during the British regime. The main aim of the legislation was to prevent and prohibit child marriages in India. This Act was applicable to all the communities but act did not govern the validity of child marriage as the personal laws of the contracting parties governed it. This Act provided for the penalty imposed on the persons in violation of the provisions of the said legislation.² The Supreme

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1. *Roopa Reddy v. Prabhakar Reddy*, AIR 1994 Kar. 12.

2. Sec. 3 of the Child Marriage Restraint Act, 1929. "Punishment for male adult below twenty-one years of age marrying a child. Whoever, being a male above eighteen years of age and below twenty-one, contracts a child marriage shall be punishable with simple imprisonment, which may extend to fifteen days, or with fine which may extend to one thousand rupees, or with both."

Sec. 4 of the Child Marriage Restraint Act, 1929. "Punishment for male adult above twenty-one years of age marrying a child. Whoever, being a male above twenty-one years of age, contracts a child marriage shall be punishable with simple imprisonment, which may extend to three months and shall also be liable to fine."

Sec. 5 of the Child Marriage Restraint Act, 1929. Punishment for solemnizing a child marriage. "(1) Whoever performs, conducts or directs any child marriage shall be punishable with simple imprisonment which may extend to three months and shall also be liable to fine, unless he proves that he had reason to believe that the marriage was not a child marriage."

Sec. 6 of the Child Marriage Restraint Act, 1929. "Punishment for parent or guardian concerned in a child marriage. (1) Where a minor contracts a child marriage, any person having charge of the minor, whether as parent or guardian or in any other capacity, lawful or unlawful, who does any act to promote the marriage or permits it to be solemnized, or negligently fails to prevent it from being solemnized, shall be punishable with simple imprisonment which may extend to three months and shall also be liable to fine. Provided that no woman shall be punishable with imprisonment. (2) For the purposes of this section, it shall be presumed, unless and

Court in *Lila Gupta v. Laxmi Narain*³ held that, “a reference to the Child Marriage Restraint Act, 1929 would show that it was enacted to carry forward the reformist movement of prohibiting child marriages and, while it made a marriage in contravention of the provisions of that Act punishable, it did not render the marriage void.” The Act has been repealed and replaced by the present legislation *i.e.*, the Prohibition of Child Marriage Act, 2006. The stated legislation declares child marriage as voidable⁴ marriage at the instance of the contracting parties and provides for punishment and fine⁵ for the same.

As per Hindu personal law, age of the parties is one of the essentials of Hindu Marriage laid down under section 5⁶ of the Hindu Marriage Act, 1955 but violation of this essential condition does not render child marriage void under section 11⁷ or voidable under

until the contrary is proved, that where a minor has contracted a child marriage, the person having charge of such minor has negligently failed to prevent the marriage from being solemnized.”

³ (1978)3SCC258.

⁴ Sec. 3 of the Prohibition of Child Marriage Act, 2006. “Child marriages to be voidable at the option of contracting party being a child. — (1) Every child marriage, whether solemnized before or after the commencement of this Act, shall be voidable at the option of the contracting party who was a child at the time of the marriage: Provided that a petition for annulling a child marriage by a decree of nullity may be filed in the district court only by a contracting party to the marriage who was a child at the time of the marriage. (2) If at the time of filing a petition, the petitioner is a minor, the petition may be filed through his or her guardian or next friend along with the Child Marriage Prohibition Officer. (3) The petition under this section may be filed at any time but before the child filing the petition completes two years of attaining majority. (4) While granting a decree of nullity under this section, the district court shall make an order directing both the parties to the marriage and their parents or their guardians to return to the other party, his or her parents or guardian, as the case may be, the money, valuables, ornaments and other gifts received on the occasion of the marriage by them from the other side, or an amount equal to the value of such valuables, ornaments, other gifts and money: Provided that no order under this section shall be passed unless the concerned parties have been given notices to appear before the district court and show cause why such order should not be passed.”

⁵*Id.* at sec. 9. “Punishment for male adult marrying a child. Whoever, being a male adult above eighteen years of age, contracts a child marriage shall be punishable with rigorous imprisonment which may extend to two years or with fine which may extend to one lakh rupees or with both.”

Sec 10. “Punishment for solemnizing a child marriage Prohibition of Child Marriage Act,2006: —Whoever performs, conducts, directs or abets any child marriage shall be punishable with rigorous imprisonment which may extend to two years and shall be liable to fine which may extend to one lakh rupees unless he proves that he had reasons to believe that the marriage was not a child marriage.”

Sec. 11. Prohibition of Child Marriage Act,2006: “Punishment for promoting or permitting solemnization of child marriages.—(1) Where a child contracts a child marriage, any person having charge of the child, whether as parent or guardian or 3 any other person or in any other capacity, lawful or unlawful, including any member of an organization or association of persons who does any act to promote the marriage or permits it to be solemnized, or negligently fails to prevent it from being solemnized, including attending or participating in a child marriage, shall be punishable with rigorous imprisonment which may extend to two years and shall also be liable to fine which may extend up to one lakh rupees: Provided that no woman shall be punishable with imprisonment. (2) For the purposes of this section, it shall be presumed, unless and until the contrary is proved, that where a minor child has contracted a marriage, the person having charge of such minor child has negligently failed to prevent the marriage from being solemnized.”

⁶Sec. 5 of the Hindu Marriage Act, 1955. “Condition for a Hindu Marriage.- A marriage may be solemnized between any two Hindus, if the following conditions are fulfilled, namely: (i) neither party has a spouse living at the time of the marriage; (ii) at the time of the marriage, neither party,- (a) is incapable of giving a valid consent of it in consequence of unsoundness of mind; or (b) though capable of giving a valid consent has been suffering from mental disorder of such a kind or to such an extent as to be unfit for marriage and the procreation of children; or (c) has been subject to recurrent attacks of insanity or epilepsy; (iii) the bridegroom has completed the age of twenty one years and the bride the age of eighteen years at the time of the marriage; (iv) the parties are not within the degrees of prohibited relationship unless the custom or usage governing each of them permits of a marriage between the two; (v) the parties are not sapindas of each other, unless the custom or usage governing each of them permits of a marriage between the two.”

⁷*Id.* at sec. 11. Nullity of marriage and divorce- Void marriages. - Any marriage solemnized after the commencement of this Act shall be null and void and may, on a petition presented by either party thereto, against the other party be so declared by a decree of nullity if it contravenes any one of the conditions specified in clauses (i), (iv) and (v) of sec. 5.

section 12⁸ of the Hindu Marriage Act, 1955. Moreover, under section 13(2) of the same law, option of puberty is provided as a special ground of divorce to a female.⁹ To exercise the special ground, her marriage has to be solemnized when she was below 15 years and on attainment of 15 years until the age of majority *i.e.*, 18 years, she has a right to repudiate the marriage.

A husband's petition for annulment of marriage was dismissed on the ground that he was under age at the time of marriage in *V. Mallikarjunaiah v. H.C. Gowramma*¹⁰, an underage marriage as a ground of void, voidable and dissolution of marriage is nowhere mentioned in section 11, 12 and 13 of the Hindu Marriage Act, 1955. It would be harsh on the part of the court if it would declare child marriage as void marriage because in such case the parties would face the grave consequences, having no fault of theirs.

Similarly under section 2(vii)¹¹ of the Dissolution of Muslim Marriage Act, 1939 matrimonial relief can be availed by a minor wife, thus the Muslim law also recognizes child marriages. Not only Hindu personal law, but Muslim personal law also provides for child marriage, as the age of marriage is the age of puberty. The probable reason why no change has been brought under Hindu personal law till now is because child marriage is still practised in the society and no unwanted stigma to be fetched on the status of the contracting parties to the marriage and moreover child born should not be unnecessarily harassed by declaring the status of marriage as void or voidable and calling child as an illegitimate child. Where family or personal laws, especially both Hindu as well as Mohammedan laws, provide for child marriage, there is little that law can change. The doctrine of '*factum valet*' has also been applied to such marriages by the courts which means that 'a fact cannot be altered by hundred texts.' In essence this means that the marriage solemnized in contravention of age requirement is itself valid inviting only penal consequences. The Prohibition of Child

⁸*Id.* at sec. 12." Voidable Marriages.-(1) Any marriage solemnized, whether before or after the commencement of this Act, shall be voidable and may be annulled by a decree of nullity on any of the following grounds, namely:- (a) that the marriage has not been consummated owing to the impotency of the respondent; or (b) that the marriage is in contravention of the condition specified in clause (ii) of Section 5; or (c) that the consent of the petitioner, or where the consent of the guardian in marriage of the petitioner was required under Section 5 as it stood immediately before the commencement of the Child Marriage Restraint (Amendment) Act, 1978, the consent of such guardian was obtained by force or by fraud as to the nature of the ceremony or as to any material fact or circumstance concerning the respondent; or (d) that the respondent was at the time of the marriage pregnant by some person other than the petitioner. (2) Notwithstanding anything contained in sub-section (1), no petition for annulling a marriage- (a) on the ground specified in clause (c) of sub-section (1) shall be entertained if- (i) the petition is presented more than one year after the force had ceased to operate or, as the case may be, the fraud had been discovered ; or (ii) the petitioner has, with his or her full consent, lived with the other party to the marriage as husband or wife after the force had ceased to operate or, as the case may be, the fraud had been discovered; (b) on the ground specified in clause (d) of sub-section (1) shall be entertained unless the court is satisfied- (i) that the petitioner was at the time of the marriage ignorant of the facts alleged; (ii) that proceedings have been instituted in the case of a marriage solemnized before the commencement of this Act within one year of such commencement and in the case of marriages solemnized after such commencement within one year from the date of the marriage; and (iii) that marital intercourse with the consent of the petitioner has not taken place since the discovery by the petitioner of the existence of the said ground."

⁹*Id.* at sec. 13(2). "A wife may also present a petition for the dissolution of her marriage by a decree of divorce on the ground- (iv) that her marriage (whether consummated or not) was solemnized before she attained the age of fifteen years and she has repudiated the marriage after attaining that age but before attaining the age of eighteen years."

¹⁰ AIR 1997 Kar. 77.

¹¹ Sec. 2 of the Dissolution of Muslim Marriage Act, 1939. "Grounds for decree for dissolution of marriage. A woman married under Muslim law shall be entitled to obtain a decree for the dissolution of her marriage on any one or more of the following grounds, namely: a woman married under Muslim law shall be entitled to obtain a decree for the dissolution of her marriage on any one or more of the following grounds: that she, having been given in marriage by her father or other guardian before she attained the age of fifteen years, repudiated the marriage before attaining the age of eighteen years Provided that the marriage has not been consummated."

Marriage Act, 2006, which seeks to prohibit the solemnization of child marriage, seems like the only weapon in the arsenal to protect the minor. It is only section 24¹² of the Special Marriage Act, 1954 that renders a child marriage a void marriage.

III. CHILD MARRIAGE *VIS-À-VIS* MARITAL RAPE

Marital rape is a grey area and it has not been defined under any legislation. It is a sexual intercourse done by husband with his own spouse that too without her consent and it can also be termed as physical or domestic violence against spouse. The ‘consent’ of wife here is based on colonial law of crime. In *R. v. R.*,¹³ the House of Lords widened the scope of criminal liability by declaring that a husband could be charged as the principal offender in the rape of his wife. This decision seems to have obliterated the protection of the husband from such prosecution under the doctrine of marital exemption. This exemption was based on the belief under which wife was regarded as chattel. She was supposed to have given her consent to her husband as natural implication of the marriage. This has become an outmoded view of marriage. The concept of marital rape has undergone a radical change in U.K. and it has been declared an offence.

Section 375(6) of the Indian Penal Code (IPC) states that a man is said to commit “rape” who, except in the case hereinafter excepted, has sexual intercourse with a woman with or without her consent, when she is under eighteen years of age. However, exception 2 to section 375 IPC¹⁴ states that “sexual intercourse by man with his and wife not being less than 15 years of age” This seems like an indirect way to somehow protect the institution of child marriage. There is societal stigma as well as acceptance regarding the same. An exception to Section 375 in the IPC does not find a man guilty to having sexual intercourse with his 15-year-old wife. Although there are other laws as well, which provide for the protection of minors such as The Protection of Children from Sexual Offences (POCSO) Act of 2012, which defines ‘children’ as those aged below 18 years. It has specific provisions declaring that ‘penetrative sexual assault’ and ‘aggravated penetrative sexual assault’ against children below 18 is rape. The Protection of Women from Domestic Violence Act, 2005, which seeks to punish sexual abuse by husband, also offers remedy for aggrieved wives (whether minor or adult). There is a gross human rights violation as there is a distinction between a girl who is married and the one who is not. Protection against sexual offences has been given to an unmarried girl less than 18 years under all the above stated legislation but when it comes to protection to a married girl against sexual act against her that too by her husband has not been declared an offence (Marital Rape). After the Criminal Laws Amendment Act, 2013, the age of consent by a girl for sexual intercourse has increased from 16 to 18 but for a married girl it is still 15. The distinction made between married and

¹²Sec. 24 of the Special Marriage Act, 1954. Void marriages. “(1) Any marriage solemnized under this Act shall be null and void (and may, on a petition presented by either party thereto against the other party, be so declared) by a decree of nullity if- (i) any of the conditions specified in Cls.(a),(b), (c) and (d) of Sec. 4 has not been fulfilled : or (ii) the respondent was impotent at the time of the marriage and at the time of the institution of the suit.(2) Nothing contained in this section shall apply to any marriage deemed to be solemnized under the Act within the meaning of Sec. 18, but the registration of any such marriage under Chapter III may be declared to be of no effect if the registration was in contravention of any of the conditions specified in Cls. (a) to (e) of Sec. 15. Provided that no such declaration shall be made in any case where an appeal has been preferred under Sec.17 and the decision of the District Court has become final.”

¹³ (1992) I AC 599.

¹⁴Exception to sec. 375 IPC, “sexual intercourse by a man with his own wife, the wife not being under 15 years of age, is not rape”.

unmarried girl is violative of fundamental rights of citizens enshrined under Article 14¹⁵, 15¹⁶ and 21¹⁷ of the Indian Constitution.

In the case of *Independent Thought v. Union of India*,¹⁸ a two judge Bench of the Supreme Court held that sexual intercourse with minor (below 18 years) wife is rape. Public Interest Litigation was filed that had challenged the validity of exception 2 to section 375.

Following are the major five observations in this case:

1. Supreme Court said the exception in the rape law was contrary to the philosophy of other statutes and violated the bodily integrity of a girl child. The two-judge bench also expressed concern over the prevalent practice of child marriage in India and said social justice laws were not implemented with the spirit with which they have been enacted by Parliament.
2. The Supreme Court clarified that it has not dealt with the issue of marital rape as it was not raised by respective parties.
3. Justice Gupta wrote a separate but concurrent verdict. He said the age of marriage was 18 in all laws and the exception given in the rape law under the IPC is “capricious, arbitrary and violates the rights of a girl child.
4. SC also said the exception violated Article 14, 15 and 21 of the Constitution.
5. To prevent child marriage across the country, SC asked Centre and states to take proactive steps. It also voiced concerns over thousands of minor girls being married in mass wedding ceremonies on the occasion of akshaya tritiya.

IV. CONCLUSION

By having a law, which was the result of colonial system and which allowed husband to have sexual intercourse with his minor wife, is against the provisions of Indian Constitution, and in contradiction of the provisions of International Convention on the Rights of Child and this is still the part of the IPC. We are in a state of dilemma that are we looking forward or looking back. These issues are not at bothering judiciary but judiciary is very active when it comes to the protection and preservation of institution of marriage but not concerned about the human rights violation of the child under the Indian Constitution. On the other hand, Parliament the issue of marital rape was debated and discussed several times but no substantive changes have been brought. Judiciary has also shifted the responsibility on the Parliament. We have laws relating to the prohibition of child marriage but child marriages are still being performed in several parts of India. The Apex Court has left completely the interpretation of the word “consent” which was the main issue in the writ petition. The impact

¹⁵Art. 14 of the Constitution of India. Equality before law. “The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India Prohibition of discrimination on grounds of religion, race, caste, sex or place of birth.”

¹⁶Art. 15 of the Constitution of India, “Prohibition of discrimination on grounds of religion, race, caste, sex or place of birth (1) The State shall not discriminate against any citizen on grounds only of religion, race, caste, sex, place of birth or any of them. (2) No citizen shall, on grounds only of religion, race, caste, sex, place of birth or any of them, be subject to any disability, liability, restriction or condition with regard to (a) access to shops, public restaurants, hotels and palaces of public entertainment; or (b) the use of wells, tanks, bathing ghats, roads and places of public resort maintained wholly or partly out of the state funds or dedicated to the use of the general public. (3) Nothing in this article shall prevent the State from making any special provision for women and children (4) Nothing in this article or in clause (2) of art. 29 shall prevent the State from making any special provision for the advancement of any socially and educationally backward classes of citizens or for the Scheduled Castes and the Scheduled Tribes.”

¹⁷Art. 21 of the Constitution of India, “No person shall be deprived of his life or personal liberty except according to a procedure established by law.”

¹⁸Writ Petition (Civil) No. 382 of 2013.

of the judgment for those who are in child marriage will be to immediately live separately until the girl reaches the age of 18. This judgment directly exposes the husband to criminal prosecution for rape even if the wife of child marriage has given consent for sexual intercourse. The need of the hour is to relook the colonial laws in the pretext of the contemporary and prevailing circumstances in the society